APPENDICES

APPENDIX A

[Filed Jun. 22, 1998]

IN THE SUPREME COURT OF MISSISSIPPI

No. 97-M-01181

IN RE: BOGALUSA CHEMICAL RELEASE

ORDER

This matter has come before a panel of the Court consisting of Sullivan, P.J., Roberts, and Mills, JJ. on the Petition for Interlocutory Appeal filed by Kansas City Southern Railway Company, and having considered same, the panel finds the Petition is not well-taken and that it should be denied.

IT IS THEREFORE ORDERED that the Petition for Interlocutory Appeal filed by Kansas City Southern Railway Company is denied.

SO ORDERED, this, the 20th day of May, 1998.

/s/ Michael P. Mills
MICHAEL P. MILLS
Justice

APPENDIX B

IN THE CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 251-96-493 All Cases

IN RE BOGALUSA CHEMICAL RELEASE

ORDER

THIS DAY came on for hearing the Motion for Judgment on the Pleadings and *ore tenus* Motion for Certification of Interlocutory Appeal Pursuant to Rule 5(a) of the Mississippi Rules of Appellate Procedure of Defendant, The Kansas City Southern Railway Company. The Court, having considered the Motions, supporting memorandum and the argument of counsel and being fully advised in the premises, finds that the Motions are not well taken, the relief sought should be denied and that the factors set forth in Rule 5(a) of the Mississippi Rules of Appellate Procedure are not applicable such as to justify certifying this matter for interlocutory appeal.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion for Judgment on the Pleadings of the Defendant, The Kansas City Southern Railway Company, is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the *ore tenus* Motion for Certification for Interlocutory Appeal of this Court's order denying The Kansas City Southern Railway Company's Motion for Judgment on the Pleadings is denied.

SO ORDERED, this the 22 day of September, 1997.

By: /s/ James E. Graves, Jr.
Circuit Court Judge

APPENDIX C

CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

No. 251-96-000493, All Cases

IN RE: BOGALUSA CHEMICAL RELEASE

TRANSCRIPT OF PROCEEDINGS

Date: August 22, 1997

BEFORE: HON. JAMES E. GRAVES, JR.

* * * *

[29] BY THE COURT: Let me tell you where I am, Mr. Luke, and you may be able [to] convince me that I have no business being there, but here's where I am. I don't think there's much argument that there are loads of federal regulations that have to do with what it is this Defendant did and their claims against this Defendant. But apparently everybody concedes that the state's tort law is the only remedy that would be available to the Plaintiffs in the event your client violated these regulations. Which is to say that the FRSA [30] and then the other act dealing with hazardous materials transportation clearly set forth all the regulations in terms of how you're supposed to handle it and what you're supposed to do. But they just don't bother to provide what the remedy is for an individual plaintiff if one of these regulations gets violated.

And doesn't it stand to reason if they're going to say all that, they could have said and when this happens their exclusive remedy is this. I guess the same argument that you're using that says it is so all-encompassing seems to

me to be the best one for the Plaintiffs to say, well, if they said all that then they could have said everything else they wanted to say, which is there is no other remedy, this is the inclusive remedy, we expressly preempt any state tort claim law. Do you see what I'm saying? When you're that comprehensive, it's all the more reason that I should presume that they said everything they meant to say and whatever they didn't say, they didn't mean to deal with it.

I may be oversimplifying the whole thing which I'm guilty of doing a lot because I just need to keep it simple for me, but it just seems to me that when they addressed all of that, then they could have gone ahead and said what you needed them to say so they couldn't bring these claims.

[31] MR. LUKE: Your Honor, that is the argument that is made and that's the argument that's made everywhere. That argument has been—

THE COURT: It's been tried and lost, right?

MR. LUKE: —the Liggett case, the cigarette case, it's been done in that, and on and on. In every one, they always say that. But if we were writing on a blank sheet of paper here tha. might be an argument you could use, but the Supreme Court which is the final arbiter of what the congressional intent is has said—they were talking about one of the exceptions was that the common law of negligence should be allowed and that was not preempted, and this is what the Supreme Court says.

It says the common law of negligence provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions. Then it talks about the respondents who were the plaintiffs in this case. Their view would completely deprive the Secretary of the power to preempt state common law, a power clearly conferred by Section 434.

The Supreme Court has already said that if the regulation covers the subject matter, state law, whether it's a regulation, common law, tort claim; it's preempted. In

Easterwood, the claim that was preempted there was a state common law tort action at a crossing accident. If the Supreme Court had not ruled on that, then maybe that argument would be valid. But the Supreme Court has already said it doesn't matter. We understand there's not a private remedy here but Congress intended to allow the [32] Secretary to preempt state common law by passing these regulations. Without dispute, the regulations covering the subject matter of this have been passed and the Supreme Court has already made the ruling for us. The Supreme Court has already said common law tort actions are preempted.

* * * *

And the reason there's no remedy under FRSA is because it specifically reserved the right for all enforcement activity to be done by the Federal government, by the Secretary, for both penalties, fines, and criminal prosecutions. So Congress was clear. They said we're passing this law and if there's a state law on that issue, it's gone.
* * *

* * * *

[39] THE COURT: [T]he pleadings reflect that the nature of the claims raised by this Plaintiff and the breadth of the claims raised by this Plaintiff are such that the Court is not persuaded that the federal statutes would preempt the state tort law claims. Even more particularly, it is conceded that while the federal acts may provide some criminal and civil [40] penalties, it would allow that no individual plaintiff would have a remedy for violations of any regulations that are specifically set forth in these acts.

The Court is persuaded that where the state law does provide a remedy, does provide that a plaintiff can maintain a claim, that certainly based on the pleadings the Court is not persuaded that the Plaintiff should at this juncture be denied the opportunity to pursue a remedy based on state law claims. Hence, the Court determines that the motion for judgment on the pleadings should be and is hereby denied.

* * * *

APPENDIX D

PERTINENT STATUTORY PROVISIONS

Federal Railroad Safety Act

49 U.S.C. § 20101 provides:

§ 20101. Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

* * * *

49 U.S.C. § 20103 provides in pertinent part:

§ 20103. General authority

(a) REGULATIONS AND ORDERS.—The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.

(b) REGULATIONS OF PRACTICE FOR PROCEEDINGS.—The Secretary shall prescribe regulations of practice applicable to each proceeding under this chapter. The regulations shall reflect the varying nature of the proceedings and include time limits for disposition of the proceedings. The time limit for disposition of a proceeding may not be more than 12 months after the date it begins.

(c) CONSIDERATION OF INFORMATION AND STANDARDS.—In prescribing regulations and issuing orders under this section, the Secretary shall consider existing relevant safety information and standards.

* * * *

49 U.S.C. § 20105 provides in pertinent part:

§ 20105. State participation

(a) INVESTIGATIVE AND SURVEILLANCE ACTIVITIES.—The Secretary of Transportation may prescribe investigative and surveillance activities necessary to enforce the safety regulations prescribed and orders issued by the Secretary that apply to railroad equipment, facilities, rolling stock, and operations in a State. The State may participate in those activities when the safety practices for railroad equipment, facilities, rolling stock, and operations in the State are regulated by a State authority and the authority submits to the Secretary an annual certification as provided in subsection (b) of this section.

(b) ANNUAL CERTIFICATION.—(1) A State Authority's annual certification must include—

(A) a certification that the authority—

(i) has regulatory jurisdiction over the safety practices for railroad equipment, facilities, rolling stock, and operations in the State;

(ii) was given a copy of each safety regulation prescribed and order issued by the Secretary, that applies to the equipment, facilities, rolling stock, or operations, as of the date of certification; and

(iii) is conducting the investigative and surveillance activities prescribed by the Secretary under subsection (a) of this section; and

(B) a report, in the form the Secretary prescribes by regulation, that includes—

(i) the name and address of each railroad carrier subject to the safety jurisdiction of the authority;

(ii) each accident or incident reported during the prior 12 months by a railroad carrier involving a fatality, personal injury requiring hospitalization, or property damage of more than $750 (or a higher amount prescribed by the Secretary), and a summary of the authority's investigation of the cause and circumstances surrounding the accident or incident;

(iii) the record maintenance, reporting, and inspection practices conducted by the authority to aid the Secretary in enforcing railroad safety regulations prescribed and orders issued by the Secretary, including the number of inspections made of railroad equipment, facilities, rolling stock, and operations by the authority during the prior 12 months; and

(iv) other information the Secretary requires.

(2) An annual certification applies to a safety regulation prescribed or order issued after the date of the certification only if the State authority submits an appropriate certification to provide the necessary investigative and surveillance activities.

(3) If, after receipt of an annual certification, the Secretary decides the State authority is not complying satisfactorily with the investigative and surveillance activities prescribed under subsection (a) of this section, the Secretary may reject any part of the certification or take other appropriate action to achieve adequate enforcement. The Secretary must give the authority notice and an opportunity for a

hearing before taking action under this paragraph. When the Secretary gives notice, the burden of proof is on the authority to show that it is complying satisfactorily with the investigative and surveillance activities prescribed by the Secretary.

49 U.S.C. § 20106 provides:

§ 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20111 provides in pertinent part:

§ 20111. Enforcement by the Secretary of Transportation

(a) EXCLUSIVE AUTHORITY.—The Secretary of Transportation has exclusive authority—

(1) to impose and compromise a civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary;

(2) except as provided in section 20113 of this title, to request an injunction for a violation of a railroad safety regulation prescribed or order issued by the Secretary; and

(3) to recommend appropriate action be taken under section 20112(a) of this title.

(b) COMPLIANCE ORDERS.—The Secretary may issue an order directing compliance with this part or with a railroad safety regulation prescribed or order issued under this part.

(c) ORDERS PROHIBITING INDIVIDUALS FROM PERFORMING SAFETY-SENSITIVE FUNCTIONS.—If an individual's violation of this chapter or any of the laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act, as in effect on June 1, 1994, or a regulation prescribed or order issued by the Secretary under this chapter is shown to make that individual unfit for the performance of safety-sensitive functions, the Secretary, after notice and opportunity for a hearing, may issue an order prohibiting the individual from performing safety-sensitive functions in the railroad industry for a specified period of time or until specified conditions are met. This subsection does not affect the Secretary's authority under section 20104 of this title to act on an emergency basis.

(d) REGULATIONS REQUIRING REPORTING OF REMEDIAL ACTIONS.—(1) The Secretary shall prescribe regulations to require that a railroad carrier notified by the Secretary that imposition of a civil penalty will be recommended for a failure to comply with this part, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions, shall report to the Secretary, not later than the 30th day after the end of the month in which the notification is received—

(A) actions taken to remedy the failure; or

(B) if appropriate remedial actions cannot be taken by that 30th day, an explanation of the reasons for the delay.

49 U.S.C. § 20112 provides in pertinent part:

§ 20112. Enforcement by the Attorney General

(a) CIVIL ACTIONS.—At the request of the Secretary of Transportation, the Attorney General may bring a civil action in a district court of the United States—

(1) to enjoin a violation of, or to enforce, a railroad safety regulation prescribed or order issued by the Secretary;

(2) to collect a civil penalty imposed or an amount agreed on in compromise under section 21301 of this title; or

(3) to enforce a subpena issued by the Secretary under this chapter.

49 U.S.C. § 20113 provides in pertinent part:

§ 20113. Enforcement by the States

(a) INJUNCTIVE RELIEF.—If the Secretary of Transportation does not begin a civil action under section 20112 of this title to enjoin the violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 15 days after the date the Secretary receives notice of the violation and a request from a State authority participating in investigative and surveillance activities under section 20105 of this title that the action be brought, the authority may bring a civil action in a district court of the United States to enjoin the violation. This subsection does not apply if the Secretary makes an affirmative

written finding that the violation did not occur or that the action is not necessary because of other enforcement action taken by the Secretary related to the violation.

(b) IMPOSITION AND COLLECTION OF CIVIL PENALTIES.—If the Secretary does not impose the applicable civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 60 days after the date of receiving notice from a State authority participating in investigative and surveillance activities under section 20105 of this title, the authority may bring a civil action in a district court of the United States to impose and collect the penalty. This paragraph does not apply if the Secretary makes an affirmative written finding that the violation did not occur.

Hazardous Materials Transportation Act

49 U.S.C. § 5101 provides:

§ 5101. Purpose

The purpose of this chapter is to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation.

* * * *

49 U.S.C. § 5103 provides:

§ 5103. General regulatory authority

(a) DESIGNATING MATERIAL AS HAZARDOUS.—The Secretary of Transportation shall designate material (including an explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas) or a group or class of material as hazardous when the Secretary decides that transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property.

(b) REGULATIONS FOR SAFE TRANSPORTATION.—(1) The Secretary shall prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce. The regulations—

(A) apply to a person—

(i) transporting hazardous material in commerce;

(ii) causing hazardous material to be transported in commerce; or

(iii) manufacturing, fabricating, marking, maintaining, reconditioning, repairing, or testing a packaging or a container that is represented, marked, certified, or sold by that person as qualified for use in transporting hazardous material in commerce; and

(B) shall govern safety aspects of the transportation of hazardous material the Secretary considers appropriate.

(2) A proceeding to prescribe the regulations must be conducted under section 553 of title 5, including an opportunity for informal oral presentation.

* * * *

49 U.S.C. § 5106 provides:

§ 5106. Handling criteria

The Secretary of Transportation may prescribe criteria for handling hazardous material, including—

(1) a minimum number of personnel;

(2) minimum levels of training and qualifications for personnel;

(3) the kind and frequency of inspections;

(4) equipment for detecting, warning of, and controlling risks posed by the hazardous material;

(5) specifications for the use of equipment and facilities used in handling and transporting the hazardous material; and

(6) a system of monitoring safety procedures for transporting the hazardous material.

* * * *

49 U.S.C. § 5122 provides:

§ 5122. Enforcement

(a) GENERAL.—At the request of the Secretary of Transportation, the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this chapter or a regulation prescribed or order issued under this chapter. The court may award appropriate relief, including punitive damages.

(b) IMMINENT HAZARDS.—(1) If the Secretary has reason to believe that an imminent hazard exists the Secretary may bring a civil action in an appropriate district court of the United States—

(A) to suspend or restrict the transportation of the hazardous material responsible for the hazard; or

(B) to eliminate or ameliorate the hazard.

(2) On request of the Secretary, the Attorney General shall bring an action under paragraph (1) of this subsection.

49 U.S.C. § 5123 provides:

§ 5123. Civil penalty

(a) PENALTY.—(1) A person that knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least $250 but not more than $25,000 for each violation. A person acts knowingly when—

(A) the person has actual knowledge of the facts giving rise to the violation; or

(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

(2) A separate violation occurs for each day the violation, committed by a person that transports or causes to be transported hazardous material, continues.

(b) HEARING REQUIREMENT.—The Secretary of Transportation may find that a person has violated this chapter or a regulation prescribed under this chapter only after notice and an opportunity for a hearing. The Secretary shall impose a penalty under this section by giving the person written notice of the amount of the penalty.

(c) PENALTY CONSIDERATIONS.—In determining the amount of a civil penalty under this section, the Secretary shall consider—

(1) the nature, circumstances, extent, and gravity of the violation;

(2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and

(3) other matters that justice requires.

(d) CIVIL ACTIONS TO COLLECT.—The Attorney General may bring a civil action in an appropriate district court of the United States to collect a civil penalty under this section.

(e) COMPROMISE.—The Secretary may compromise the amount of a civil penalty imposed under this section before referral to the Attorney General.

(f) SETOFF.—The Government may deduct the amount of a civil penalty imposed or compromised under this section from amounts it owes the person liable fo. the penalty.

(g) DEPOSITING AMOUNTS COLLECTED.—Amounts collected under this section shall be deposited in the Treasury as miscellaneous receipts.

49 U.S.C. § 5124 provides:

§ 5124. Criminal penalty

A person knowingly violating section 5104(b) of this title or willfully violating this chapter or a regulation prescribed or order issued under this chapter shall be fined under title 18, imprisoned for not more than 5 years, or both.

49 U.S.C. § 5125 provides in pertinent part:

§ 5125. Preemption

(a) GENERAL.—Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

(b) SUBSTANTIVE DIFFERENCES.—(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

(2) If the Secretary of Transportation prescribes or has prescribed under section 5103(b), 5104, 5110, or 5112 of this title or prior comparable provision of law a regulation or standard related to a subject referred to in paragraph (1) of this subsection, a State, political subdivision of a State, or Indian tribe may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as a provision of this chapter or a regulation prescribed or order issued under this chapter. The Secretary shall decide on and publish in the Federal Register the effective date of section 5103(b) of this title for any regulation or standard about any of those subjects that the Secretary prescribes after November 16, 1990. However, the effective date may not be earlier than 90 days after the Secretary prescribes the regulation or standard nor later than the last day of the 2-year period beginning on the date the Secretary prescribes the regulation or standard.